IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1542 of 2004
with
Civil Application No. 5106 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NATIONAL INSURANCE CO LTD.
Versus
AMITABEN WD/O PAVANKUMAR @ PUSHKRAJ CHANDULAL BAROT

Appearance:
1. First Appeal No. 1542 of 2004
MR DAKSHESH MEHTA for Appellant
MR MANISH A PANDYA for Respondent No. 1-3
MR DHAVAL M BAROT for Respondent No. 2,3
MR ARVIND B BAROT for Respondent No. 2-3
RULE SERVED for Respondent No. 4
UNSERVED-EXPIRED (R) for Respondent No. 5

CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 18/01/2005

ORAL JUDGEMENT

1. By filing instant appeal under Section 173 of the Motor Vehicles Act, 1988 ('the Act' for short), appellant, National Insurance Company Limited, seeks to challenge the order dated 22.11.2002 rendered in application Ex.5 filed in MACP No.1465 of 2001 by the MACT (Aux.) Mehsana by which the application filed under Section 140 of the Act by respondent Nos.1 to 3 herein/ original claimants to receive interim compensation of Rs.50,000/- on account of untimely demise of Pavankumar alias Pushkraj Chandulal Barot in a vehicular accident came to be allowed and thereby held that respondent Nos.1 to 3 herein/original claimants are entitled to receive interim compensation of Rs.50,000/- from the appellant Insurance Company as well as driver and owner of the vehicle i.e., respondent Nos. 4 and 5 herein, jointly and severally and resultantly they were directed to deposit Rs.50,000/- with running interest at the rate of 9% from the date of the filing of the application before the Tribunal within a period of 30 days.

2. Respondent Nos.1 to 3 who are the original claimants have filed MACP No. 1465 of 2001 under Section 166 of the Act before the Tribunal to recover compensation of Rs.5 lakhs from the appellant and respondent Nos.4 and 5 herein. As per the averments made in the claim petition, on 28.7.2001 deceased Pavankumar alias Pushkraj Chandulal Barot, who was the owner of matador bearing registration No. GJ 2U 3761 was travelling in the said vehicle which was driven by the driver engaged by him, who is respondent No.4 herein. It is also alleged in the claim petition that respondent No.4, driver of the matador, was driving the vehicle in a rash and negligent manner. When the said vehicle reached on the spot of accident i.e., near Jagudan Veterinary Hospital, an unknown tractor (as the registration number of which was not known) came from the opposite direction and dashed it with the matador in which the deceased was travelling and as a result of the impact, the driver of the matador lost control over the vehicle and it turned turtle and thus the accident took place in which deceased sustained injuries and succumbed to the same during the course of treatment. Respondent Nos.1 to 3 who are the heirs and legal representatives of deceased Pavankumar therefore filed the above numbed MACP claiming compensation of Rs.5 lakhs from the driver, owner and insurance company of the matador i.e., respondent Nos.4, 5 and the appellant herein, respectively.

3. In the said claim petition, the claimants have

also filed an application EX.5 for interim compensation of Rs.50,000 under section 140 of the Act. The Tribunal after considering the relevant documents i.e., FIR, Panchnama, PM Notes and insurance policy of the matador came to the conclusion that the claimants are entitled to receive interim compensation and directed the appellant and respondent Nos.4 and 5 herein jointly and severally to pay Rs.50,000/- to the claimants by way of interim compensation which has given rise to the present appeal at the instance of the appellant - the insurer of the matador.

4. The sole contention advanced by Mr. Dakshesh Mehta, learned advocate of the appellant, is that the main claim petition filed by respondent Nos.1 to 3/original claimants itself is not tenable in view of the fact that deceased himself was the owner of the matador involved in the accident which was insured with the appellant insurance company. According to him, it is the basic principle of law of torts that the insurance is a contract of indemnity and the insurance company has to indemnify the owner to the extent he is made liable. Unless the owner is made liable, the insurance company cannot be held liable. In instant case, the insured himself was travelling in his own vehicle driven by his own driver which met with an accident with an unknown tractor. Therefore, he cannot claim compensation from the insurance company of his own vehicle. According to him, the Tribunal has misdirected itself and could not properly appreciate the basic principle of law of torts which has resulted into miscarriage of justice. He therefore urged that the impugned order deserves to be quashed and set aside by allowing this appeal and prayed to allow the appeal.

5. In support of the aforesaid contention, he has relied upon the following three decisions:

(i) United India Insurance Co. Ltd. v. Jagatsinh Valsinh and others, 1986 ACJ 951 (Gujarat High Court).
(ii) National Insurance Co. Ltd. v. Sasilatha, 2000 ACJ 661 (Kerala High Court).
(iii) Oriental Insurance Co. Ltd. v. Sunita Rathi and others, 1998 ACJ 121 (SC).

6. Mr. Dhaval Barot, learned advocate of respondent Nos.1 to 3/original claimants, has contended that in the application filed under section 140 of the Act summary procedure is prescribed and hence the Tribunal is not required to consider all these aspects. The Tribunal has

to rely only on the FIR, Panchnama, disability certificate, injury certificate, post mortem note and the insurance policy. According to him, the contention raised by Mr. Mehta, learned advocate of the appellant, can be considered at the trial of the claim petition before the Tribunal. He has tried to support the impugned order which, according to him, is quite just and proper in view of the benevolent provisions contained under section 140 of the Act. He therefore urged to dismiss the appeal.

7. This Court has considered the submissions advanced by the learned advocates of the parties and has also perused the impugned order as well as statutory provisions contained in the Act, principles of law of torts and the judgments cited at the bar.

8. So far as the accident in question is concerned, there is no dispute that on the fateful day i.e., 28.7.2001 when the deceased himself was travelling in his own matador which was driven by the driver engaged by him and insured with the appellant, an unknown tractor which came from the opposite direction dashed with the matador of the deceased. As a result of the impact, the driver of the matador lost control over the vehicle and hence it turned turtle and the deceased sustained serious injuries and ultimately succumbed to the same during treatment. As per the averments made in the claim petition, the driver engaged by the deceased himself was driving the matador in a rash and negligent manner when the accident took place. After causing the accident, the tractor did not stop there and the driver of the tractor drove away the vehicle and therefore the offending tractor is unknown.

9. In these facts situation, the question that arises for consideration of this Court is as to whether the heirs and legal representatives of the deceased, as it is a fatal accident case, can claim compensation from the insurance company of the vehicle owned by the deceased for the death of the owner of the vehicle, who was travelling in his vehicle at the relevant time, as a result of the rash and negligent driving of the vehicle by the driver engaged by him?

10. It is the basis principle of law of torts that to get compensation under the Act, the first requirement is to establish that the driver of the offending vehicle was rash and negligent in driving. Unless and until the driver is found to be negligent, the owner of the vehicle cannot be fastened with the liability under the principle

of vicarious liability. Unless the owner of the vehicle is found vicariously liable, insurance company cannot be called upon to indemnify the award which is going to be passed against the owner of the vehicle. In instant case, the deceased owner of the vehicle himself was the insured (as the claim petition is filed by the heirs and legal representatives of the deceased owner of the vehicle) and the accident took place because of the negligence of his own driver. Therefore, the insurance company cannot be directed to pay the compensation on account of the death of the insured himself and the heirs and legal representatives of the deceased cannot claim compensation on account of the death of the insured who is the owner of the vehicle, from the insurer of the vehicle.

11. In United India Insurance Co. Ltd. (supra), this Court has held that insurance is a contract of indemnity and insurance company is to indemnify the owner to the extent he is made liable. Unless the owner is made liable, the insurance company cannot be held liable. In National Insurance Co. Ltd. (supra), Kerala High Court has held that the insurer is liable only to indemnify the insured and not to pay any compensation for injuries sustained by the owner - insured and that the owner of the offending vehicle cannot claim compensation under no fault liability from the insurance company for injuries stained by him in the accident. In Oriental Insurance Co. Ltd. (supra), the Supreme Court of India has held that the insurance company cannot be made liable without mulcting the liability on the insured and that the liability of insurance company arises for the purpose of indemnifying the insured under the contract of insurance when the liability of the insured has been upheld.

12. Applying the principles laid down by this Court, Kerala High Court and the Apex Court in the above referred to judgments to the facts of the present case, at the cost of repetition, be it stated that in instant case the insured himself has died in the accident while travelling in his own vehicle which was driven by his own driver in a rash and negligent manner. In aforesaid view of the matter, the insurance company cannot be asked to indemnify the insured who has died in the accident while travelling in his own vehicle insured with the appellant insurance company. Therefore, it has to be held that the Tribunal has misdirected itself in passing the impugned order in total ignorance of the basic principle of law of torts and therefore the impugned order deserves to be quashed and set aside by allowing this appeal.

13. For the foregoing reasons, the appeal succeeds and accordingly it is allowed. The impugned order dated 22.11.2002 passed by MACT (Aux.) Mehsana, below application Ex.5 in MACP No. 1465 of 2001 is quashed and set aside and resultantly the application Ex.5 in MACP No.1465 of 2001 is rejected. There shall be no order as to costs.

14. It is stated by Mr. Dakshesh Mehta, learned advocate of the appellant, that Rs.25,000/- has been deposited by the appellant with the Registry of this Court at the time of filing of the appeal and RS.25,000/has been deposited with the Tribunal in compliance the the order dated 17.8.2004 passed by this Court in Civil Application No.5106 of 2004. Therefore, the appellant may be permitted to withdraw the amount. In the facts and circumstances of the case, the registry of this Court is directed to transmit Rs.25,000/deposited by the appellant in the appeal to the concerned Tribunal forthwith, if not transmitted so far, and the Tribunal is directed to permit the appellant to withdraw the amount of Rs.25,000/- deposited by the appellant before it in pursuance of the compliance of the order dated 17.8.2004 passed by this Court in Civil Application No. 5106 of 2004 and the amount of Rs.25,000/- that will be transmitted by the registry of this Court to the Tribunal forthwith, unconditionally. In other words, the concerned Tribunal shall permit the appellant to unconditionally withdraw the entire amount of Rs.50,000/deposited by the appellant.

15. In view of the peculiar facts of the case that the tractor which allegedly dashed with the matador is unknown as it is an accident of hit and run, it would be open for respondent Nos.1 to 3/original claimants to take appropriate proceedings under Section 163 of the Act before the appropriate forum and if such an application is preferred before the appropriate forum the same shall be decided in accordance with law, sympathetically and as expeditiously as possible.

16. Since the appeal is allowed, Civil Application No.5106 of 2004 which is filed for stay of the impugned order now does not assume any survival value and hence it stands disposed of. Rule is discharged with no order as to costs.

(A.M. Kapadia, J.)

(karan)